STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEMUEL GRASTY,

Defendant-Appellant.

UNPUBLISHED
December 28, 2004

No. 248604
Wayne Circuit Court
LC No. 02-12374

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant, who had a history of mutual antagonism with his neighbors, was charged in connection with allegations that he produced a gun and threatened to kill them. Following a jury trial, he was convicted of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve terms of imprisonment of two years for felony-firearm, consecutive to and followed by concurrent terms of two to four years for felonious assault, and three to five years for felon in possession. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. PROSECUTORIAL CONDUCT

Defendant argues that prosecutorial misconduct denied him a fair trial, and that defense counsel was ineffective for failure to object to prejudicial bad acts evidence, or to locate favorable character witnesses.

A. Standard of Review

Defendant failed to object to the alleged errors, thus our review is confined to ascertaining whether there was plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

B. Analysis

Defendant complains that the prosecutor improperly vouched for the credibility of her witnesses in closing arguments. However, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220,

231; 405 NW2d 156 (1987). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment out of deference to the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Defendant frames this argument in relation to the following excerpts from the prosecutor's rebuttal:

> You saw [defendant's wife's] demeanor first-hand from the stand. Was she uncooperative when I asker her questions? Do you think perhaps she was equally uncooperative when the officers asked her for her husband's identification when, according to her, he had done nothing wrong? *I believe she was combative*. She was uncooperative. She was as angry as David Grasty was. You saw her temperament. And hopefully, despite the fact that Mr. Grasty hasn't testified—and he has every right not to testify—hopefully you've had a chance to see his demeanor in the last few days.
>
> Did he strike you as a person who may be a little combative? Ornery? Have a tendency to be explosive? *I think so*. Take all that into account.
>
> * * *
>
> . . . There was a gun. David Grasty used it, he had it, it existed.
>
> The gun that I can't produce today shouldn't impact your believing [the complaining witnesses] *because they were honest*, they were forthcoming, they didn't hide and evade their relationship with Mr. and Mrs. Grasty. *It happened exactly the way they said it did*, and I'm going to ask you to find that it happened exactly the way they said it did and convict David Grasty . . . . [Defendant's emphases incorporated.]

None of these statements drew an objection from the defense, however. Although defendant has identified vigorous argument that includes touches of the prosecutor's personal opinion, nowhere in it did the prosecutor imply that she had any extra-judicial insight into the matters upon which she was commenting, nor did she emphasize her status as a public officer sworn to the cause of justice. "[P]rovided the prosecutor's . . . argument is based upon the evidence and does not suggest that the jury decide the case upon the authority of the prosecutor's office, the words 'I believe' or 'I want you to convict' are not improper." *People v Jansson*, 116 Mich App 674, 693-694; 323 NW2d 508 (1982). There was no impropriety in this instance. A prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

Moreover, if any part of the prosecutor's argument was excessive, that excess should have been cured by the trial court's instructions to decide the case solely on the evidence, and that the statements of counsel were not evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

Defendant also makes issue of the prosecutor's mention that defendant did not testify. See *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). Although an objection to that statement would properly have been sustained, the prosecutor obviated the need for such

procedure by stating herself that defendant had no such obligation. Further, the statement in context did not imply that the jury should infer guilt from defendant's silence, but merely suggested that defendant's presence in court afforded the jury some opportunity to observe his demeanor, despite his lack of testimony. In any event, the trial court instructed the jury that "defendant has the absolute right not to testify," and thus that his not having done so "must not affect [the] verdict in any way." That instruction should have avoided any potential prejudice.

Defendant additionally argues that the prosecutor improperly evoked sympathy for the victim. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). Defendant bases this argument on the following:

> [THE PROSECUTOR]: If someone were to walk up to you tonight and hold a gun to your head and threaten you and rob you, and when that person came to trial they didn't have that gun, would you want jurors sitting as yourselves to believe you? If your child came home and told you somebody had sexually assaulted them but there wasn't any physical evidence—
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> * * *
>
> [DEFENSE COUNSEL]: I'm objecting to that. I think that's getting a little beyond—
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> THE COURT: Yes, I think so.
>
> [DEFENSE COUNSEL]: Thank you, your Honor.
>
> THE COURT: Move on . . . .
>
> [THE PROSECUTOR]: Thank you, your Honor.
>
> I think you would, and there's no reason you shouldn't expect [the complainants] to make the same expectations of you. David Grasty used it, he had it, it existed.

The trial court thus sustained an objection, the prosecutor rounded off that argumentative thread, and defense counsel asked for no further relief. The court went on to instruct the jurors, "You must not let sympathy or prejudice influence your decision." The court sustained the objection, and instructed the jury to resist any pressure of sympathy; thus, the prosecutor's brief foray into gratuitous commentary likely to arouse sympathy should not have prejudiced defendant.

Defendant also asserts that the prosecutor compared defendant to a child molester. In fact, no such comparison was made. The prosecutor instead simply posed what was clearly a hypothetical, intended to remind the jurors that offenses can take place even if physical evidence is lacking in the days that follow. We reject any suggestion that juries are so malleable that mere hypothetical mention of criminal activity of a more offensive sort can cause the jury to presume a defendant's guilt of the charged conduct. For these reasons, we reject defendant's claims of prosecutorial misconduct.

II. EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

B. Analysis

Defendant characterizes as evidence of prior bad acts the testimony from one of the complainants that defendant threatened revenge because defendant had been arrested earlier for assaulting the witness with a knife. Evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs. MRE 404(b)(1). However, a jury is entitled to hear the complete story of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Accordingly, "'Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Id.*, quoting with approval *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). In this case, the bad acts evidence of which defendant makes issue did not concern earlier, independent events, but instead bore directly on the instant accusations. Had defense counsel attempted to exclude the evidence of the full range of antagonisms that existed between defendant and the complainants, and the factual manifestations of them, the trial court would properly have rebuffed him. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Moreover, as defendant acknowledges, the sustained hostilities between defendant and the complainants potentially revealed a motive for the latter to lie at defendant's expense. Defense counsel did indeed make capital of those tensions, reminding the jury of "ongoing problems between the parties who lived next door to each other," and that there was evidence that the police once concluded in connection with an earlier altercation that the complainants had falsely reported that defendant had a gun. The strategic reasons for emphasizing the enmity that existed between those neighbors is obvious. Defendant's general arguments that the jury recognized that defendant's wife had an incentive to lie when denying that defendant was arrested previously, or that the evidence itself was "highly prejudicial, propensity evidence," fails to overcome the strong presumption that counsel's tactics were sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Finally, defendant argues that defense counsel failed to locate favorable character witnesses. However, the record citations defendant provides bring to light no references specifically to a character witness, and defendant neither names a specific witness, nor indicates what the favorable testimony might have been. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Defendant's lack of specifics leaves us with

no basis to conclude that he suffered any prejudice because of this alleged failure on the part of defense counsel. *Messenger*, *supra*.[1] For these reasons, defendant's claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette

[1] At trial, defendant named a police detective as the witness he wanted. However, the trial court stated that it understood that that witness had no personal knowledge of the matter in question, and defendant refuted that conclusion neither at trial nor on appeal.